

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MATTHEW CURTIS,
Appellant.

No. 2 CA-CR 2018-0266
Filed November 19, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20171842001
The Honorable Jeffrey T. Bergin, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

STATE v. CURTIS
Decision of the Court

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Matthew Curtis was convicted of child molestation, and the trial court sentenced him to a seventeen-year prison term. On appeal, Curtis argues the court erred by “attempting to retain the power to award restitution” for expenses that occur after sentencing and by “retain[ing] jurisdiction over restitution for the entire term of [his] prison sentence.” For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2017, N.C. reported to police that her husband, Curtis, sexually assaulted her seven-year-old daughter N.A. by penetrating her anus with his penis. A grand jury indicted Curtis for two counts of sexual conduct with a minor under fifteen, and he was subsequently convicted of one count of the lesser-included offense of child molestation.

¶3 At sentencing, the state requested the trial court “leave restitution open” so that it may be awarded if N.A. participated in counseling in the future. It explained that sexual assault victims like N.A. typically “don’t want to have anything to do with counseling . . . [and] don’t want to acknowledge what happened to them until sometime years later.” Curtis did not object, and the court determined that it would “retain jurisdiction concerning restitution.” Later during the hearing, Curtis asked the court how long restitution would be left open, and the state asserted that “the Court retains jurisdiction over restitution for the entirety of the sentence,” and, again, asked it to remain open for that period. The court subsequently ordered that it would “retain jurisdiction for the period of incarceration on the sentence for consideration of restitution.” However, the court further stated that “[s]hould [Curtis] wish for the Court to reconsider that position, then [he] may file a motion to be considered at that time.” Curtis, again, did not object.

¶4 The trial court sentenced Curtis as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

STATE v. CURTIS
Decision of the Court

Discussion

¶5 Curtis argues the trial court lacks authority to order restitution for counseling expenses incurred after the date of sentencing. He also contends the court erred by retaining jurisdiction over restitution for his entire prison sentence. Both issues are questions of law that we review de novo. *See State v. Zaputil*, 220 Ariz. 425, ¶ 7 (App. 2008) (court’s jurisdiction over restitution claim is pure question of law); *cf. Parker v. City of Tucson*, 233 Ariz. 422, ¶ 45 (App. 2013) (court’s authority reviewed de novo). Curtis, however, acknowledges that these issues were not raised below; thus, he has forfeited review for all but fundamental, prejudicial error.¹ *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Under this standard, a defendant must show error and, if it exists, that it is fundamental. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Further, “[a] defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial.” *Id.* Additionally, the defendant must make a showing of prejudice if alleging error under factors one and two. *Id.*

¶6 Victims have a constitutional right to receive restitution from the person convicted of the criminal act that caused their loss. Ariz. Const. art. II, § 2.1(A)(8). “A defendant who has been convicted of a crime shall be ordered ‘to make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss as determined by the court.’” *State v. Lewis*, 222 Ariz. 321, ¶ 6 (App. 2009) (quoting A.R.S. § 13-603(C)); *see also State v. Holguin*, 177 Ariz. 589, 591 (App. 1993). Restitution, however, is only recoverable for a victim’s economic losses that “would not have occurred

¹As the state points out, the trial court has not entered an order for restitution. Absent such an order, Curtis’s challenge to “the court’s impl[icit] claim of the power to order restitution for economic losses incurred after the date of sentencing” is not ripe because any opinion on the matter would be premature and advisory. *See Ariz. Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 444 (App. 1984) (“The ripeness doctrine arises from a reluctance of the courts to become involved in the resolution of questions of a hypothetical or abstract nature.”). Accordingly, we do not address the issue further. If the court later orders restitution, Curtis may appeal the restitution order. *See State v. Grijalva*, 242 Ariz. 72, ¶ 11 (App. 2017) (“A restitution order made after sentencing does not impair appeal rights because such orders are separately appealable.”).

STATE v. CURTIS
Decision of the Court

but for the criminal conduct” and that were “directly caused by the criminal conduct.” *State v. Linares*, 241 Ariz. 416, ¶ 7 (App. 2017). Trial courts are thus limited in ordering restitution to “those damages that flow directly from a defendant’s criminal conduct,” *State v. Wilkinson*, 202 Ariz. 27, ¶ 13 (2002), because the purpose of restitution is to make the victim whole, *State v. Guilleims*, 208 Ariz. 48, ¶ 12 (App. 2004), not to further punish the defendant, *State v. Leon*, 240 Ariz. 492, ¶ 10 (App. 2016).

¶7 Although the trial court and the state have an obligation to ensure that restitution claims are preserved and adjudicated in a timely manner, *Zaputil*, 220 Ariz. 425, n.2, the restitution statutes do not specify when restitution must be ordered, see A.R.S. §§ 13-603, 13-804, 13-805. While restitution orders are typically entered at the time of sentencing, a court cannot impose a restitution order without sufficient supporting evidence. See *Holguin*, 177 Ariz. at 591; see also *State v. Scroggins*, 168 Ariz. 8, 9 (App. 1991). The court may then retain jurisdiction until it is able to determine the appropriate restitution amount at a hearing pursuant to § 13-804(G). See *State v. Grijalva*, 242 Ariz. 72, ¶¶ 2-3, 8-9 (App. 2017) (court reserved jurisdiction to order restitution because it did not have “sufficient” evidence at the time of sentencing to support restitution award); *Zaputil*, 220 Ariz. 425, ¶¶ 2-4, 16 (court expressly retained jurisdiction over restitution for nearly three years after defendant accepted plea agreement).

¶8 Curtis argues that he received an illegal sentence because the trial court retained jurisdiction for an unreasonable time to order restitution after sentencing. Specifically, he maintains the duration of his sentence, seventeen years, is an unreasonable amount of time for the court to retain jurisdiction. Curtis relies on *In re Michelle G.*, 217 Ariz. 340 (App. 2008), to support his assertion that “additional restitution is limited to a reasonable time.” His reliance is misplaced.

¶9 In *Michelle G.*, we explained that the juvenile court may hold restitution open for a reasonable amount of time beyond disposition so that a victim may present evidence to establish financial loss. 217 Ariz. 340, ¶¶ 10-12. We further reasoned that the court abused its discretion when it reopened restitution after issuing its final disposition order without expressly holding open restitution. *Id.* ¶¶ 13-14.

¶10 Curtis, however, ignores that we have declined to extend reasoning that applies in juvenile court proceedings to criminal restitution orders because “we cannot say criminal proceedings share the special purpose and policies applicable to delinquency adjudications.” *Grijalva*, 242 Ariz. 72, ¶ 13. And in any event, the juvenile court in *Michelle G.* did

STATE v. CURTIS
Decision of the Court

not explain what constituted a reasonable amount of time, nor does Curtis provide any other authority to suggest it is unreasonable for the court to retain jurisdiction throughout his prison sentence.

¶11 Instead, we find this court’s reasoning in *State v. Howard*, 168 Ariz. 458 (App. 1991), instructive. In *Howard*, the defendant was ordered to pay restitution for the victim’s future medical care and future lost wages. *Id.* at 459. The defendant argued that he was not required to pay any future expenses because A.R.S. § 13-105(16)² uses “incurred” to define economic loss. *Id.* We concluded that “interpret[ing] the statute in the manner asserted by the defendant would defeat the intention of the legislature in enacting . . . restitution statutes, and would create an irreconcilable conflict between [§ 13-105(16)] and related statutory provisions.” *Id.* We further explained that limiting restitution to the victim’s economic loss incurred prior to sentencing would defeat the legislative purpose of making victims whole because a victim suffering from “major injuries” may not have incurred all expenses caused by the defendant by that time. *Id.* at 459-60.

¶12 Our reasoning in *Howard* applies in this case as well. A trial court should be permitted to exercise jurisdiction beyond sentencing to order restitution for a victim’s future economic loss not calculable at the time of sentencing. *See id.* To hold otherwise would frustrate the purpose of the restitution statutes to make victims whole. *See id.* Specifically, as *Howard* explained, in this case because N.A. has sustained “major injuries” from Curtis’s criminal conduct and her expenses were not fully calculable at sentencing, *id.* at 460, limiting the court’s jurisdiction would prevent it from ordering restitution “in the full amount of the economic loss,” as required by § 13-603(C).

¶13 Thus, we find no error in the trial court retaining jurisdiction for the duration of Curtis’s sentence. N.A.’s economic loss was not calculable at the time of sentencing, *see Grijalva*, 242 Ariz. 72, ¶¶ 2-3, 8-9; *Zaputil*, 220 Ariz. 425, ¶¶ 2-4, 16, and she has a constitutional right to any economic loss stemming from Curtis’s criminal conduct, *see* Ariz. Const. art.

²*Howard* discusses § 13-105(11), which has since been renumbered to § 13-105(16). *See* 2008 Ariz. Sess. Laws, ch. 301, § 10; 1994 Ariz. Sess. Laws, ch. 200, § 3; 1993 Ariz. Sess. Laws, ch. 225, § 5. For consistency purposes, we use § 13-105(16).

STATE v. CURTIS
Decision of the Court

II, § 2.1(A)(8).³ Therefore, the court did not impose an illegal sentence, and we find no error, fundamental or otherwise. *See Escalante*, 245 Ariz. 135, ¶ 21.

Disposition

¶14 We affirm Curtis’s conviction and sentence.

³Notably, N.A. had been receiving counseling prior to sentencing, but, according to her mother, N.A. “stopped [because] she was doing better.” The state points out, and Curtis does not appear to dispute, that “ongoing psychological counseling is often warranted” for child victims who have been molested.